

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: Chapter 7
Infinite Spirits, Inc., BKY No. 12-50010-GFK
Debtor.

J. Richard Stermer, Trustee, Adversary No.: _____
Plaintiff,

vs. **ADVERSARY COMPLAINT**

Permeate Refining LLC,
Defendant.

Plaintiff, J. Richard Stermer (“Plaintiff”), Chapter 7 Trustee in the above-referenced pending bankruptcy proceeding of INFINITE SPIRITS, INC., for his Complaint against the above-named Defendant, states and alleges as follows:

STATEMENT OF JURISDICTION AND VENUE

1. This court has jurisdiction over this adversary proceeding pursuant to 11 U.S.C. §§ 157(a) and 1334(b). This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).
2. This is an adversary proceeding under Rule 7001 of the Federal Rules of Bankruptcy Procedure that relates to the above-captioned bankruptcy case. The bankruptcy case is pending in this district before this court.
3. The Petition commencing the Chapter 7 Bankruptcy case for Infinite Spirits, Inc. was filed on January 5, 2012, and is now pending before this Court.
4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409(a) as this is a proceeding related to a case under Title 11 of the United States Code pending before this court.

PARTIES

5. Plaintiff, J. Richard Stermer, has been duly appointed as the Chapter 7 Bankruptcy Trustee in this pending bankruptcy proceeding.

6. Permeate Refining LLC (“Defendant”) is an Iowa limited liability company with a registered office at 3092 Highway 38, Hopkinton, IA 52237.

FACTS

7. On June 7, 2012, the court entered an order authorizing the Trustee to (i) sell estate assets by auction, (ii) sell estate assets free and clear of liens and interests, (iii) settle a disputed claim regarding estate assets, and (iv) direct the disposition of sale proceeds.

8. Pursuant to the Order, the Trustee noticed and advertised an auction of the estate assets of the debtor, Infinite Spirits, Inc. (the “Auction”).

9. The Auction consisted of both (i) an entirety bid component requiring that entirety bidders submit bids by June 21, 2012, and (ii) an online auction for separate lots ending on June 26, 2012.

10. According to the Auction terms, the estate assets would be sold together to the entirety bidder, or if the cumulative bids on individual lots were higher than the highest entirety bid, then to the individual bidders.

11. Further, according to the Auction terms, payment was due at sale, and was required to post no later than June 27, 2012. Following the Auction, the Auction terms required that all estate assets be removed from Infinite Spirit Inc.’s Blaine, Minnesota location no later than July 6, 2012.

12. According to the Auction terms, each entirety bidder was required to deposit with Plaintiff an earnest money deposit equal to 20% of its bid. Upon acceptance of an entirety bid by Plaintiff as the winning bid, that bidder’s earnest money deposit became non-refundable.

13. Defendant, submitted a timely entirety bid of \$366,666.66 and an earnest money deposit of \$73,333.33, in the form of a check, dated June 20, 2012. Included with this bid was a 10% buyer's premium, which brought the total bid to \$403,333.33. Subsequently, that entirety bid was determined by the Plaintiff to be the highest bid, and thus the winning bid, for all assets of the estate.

14. Following the Auction, Defendant defaulted on its obligation to complete the purchase of the estate assets by failing to remit the balance of the payment.

15. Additionally, Defendant issued a stop payment for its earnest money deposit check it had submitted in connection with its entirety bid.

16. Plaintiff tried to contact Defendant on multiple occasions to request that the Defendant cure the default; these attempts include various telephone calls and letters.

17. After Defendant's breach of contract, Plaintiff re-opened the auction and proceeded to sell the estate assets. At the second auction, the total purchase price for the assets, paid by two different bidders, was \$142,500.00.

COUNT 1 – BREACH OF CONTRACT

18. Plaintiff re-alleges and reaffirms the preceding paragraphs.

19. According to Minnesota Statute §336.2-703, if a buyer "fails to make a payment on or before delivery," the seller may "resell and recover damages" as provided in Minnesota Statute §336.2-706. According to Minnesota Statute §336.2-706, where the resale was made in "good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages...but less expenses saved in consequence of the buyer's breach."

20. According to the terms of the Auction, payment was due at sale, and was required to post no later than June 27, 2012. Defendant materially breached the contract when Defendant failed to

send payment to Plaintiff for the balance of the Auction bid.

21. Also, according to the terms of the Auction, should the winning bidder fail to perform, its earnest money deposit would become non-refundable. Defendant had previously sent the Plaintiff an earnest money deposit in the amount of \$73,333.33. Defendant breached the contract by issuing a “stop payment” on the earnest money deposit that had become non-refundable upon Defendant winning the Auction and failing to perform.

22. After Defendant’s breach of contract, Plaintiff re-opened the auction and proceeded to sell the estate assets. The total purchase price for the assets was \$142,500.00. The subsequent sale was made in good faith, and in a commercially reasonable manner. Plaintiff did not have to incur additional costs of \$57,600 that would have been payable to a third party had the original sale for \$403,333.33 been performed.

23. As to Count 1, Plaintiff requests that the court enter an Order: (a) finding that Defendant materially breached its contract with Plaintiff by failing to make payment in the amount of its total winning auction bid; (b) finding that Defendant breached its contract with Plaintiff by stopping payment on its non-refundable earnest money deposit; (c) finding that Plaintiff in good faith, and in a commercially reasonable manner, resold the assets at auction for a total of \$142,500.00; and (d) awarding Plaintiff a money judgment against Defendant in the amount of \$203,233.33, plus costs and attorney’s fees.

COUNT 2 – DISHONORED CHECK

24. According to Minnesota Statute §604.113, if a dishonored check is not paid within 30 days after the payee has been given notice of the dishonor, along with a description of the penalties contained in this section, the party who issued the dishonored check is liable for the following penalties: (i) the amount of the check; (ii) a \$30.00 service charge; (iii) a civil penalty of up to \$100.00

or the value of the check, whichever is greater; (iv) 10% yearly interest rate on the value of the check from the date of the dishonor; and (v) reasonable attorney's fees.

25. On June 26, 2012, Plaintiff deposited the non-refundable earnest money deposit from Defendant in the amount of \$73,333.33, which was in the form of a check, dated June 20, 2012. This non-refundable earnest money deposit was made in connection with Defendant's entirety bid for the assets of Infinite Spirits, Inc. Plaintiff later discovered that Defendant had issued a "stop payment" on the \$73,333.33 check.

26. Plaintiff sent a Notice and Demand for Payment to Defendant regarding the \$73,333.33 check on July 5, 2012. A discussion of the penalties regarding Minnesota Statute §604.113 took place in correspondence between Plaintiff's Attorney, James MacGillis, and the Defendant's Attorney, Raymond Stefani II, in phone calls and letters in July of 2012.

27. As to Count 2, Plaintiff requests that the court enter an Order: (a) finding that Defendant issued a check in the amount of \$73,333.33 that was dishonored; (b) finding that Plaintiff gave Defendant proper notice and demand for payment regarding the dishonored check; (c) finding that Plaintiff gave proper notice to Defendant of penalties it would be liable for under §604.113; and (d) awarding Plaintiff a money judgment against Defendant in the amount of \$146,696.66, plus interest, costs, and attorney's fees.

WHEREFORE, Plaintiff prays for Judgment to be entered in favor of the Plaintiff, and against Defendant, Permeate Refining LLC, as follows:

1. As to Count 1: (a) finding that Defendant materially breached its contract with Plaintiff by failing to make payment in the amount of its total winning auction bid; (b) finding that Defendant breached its contract with Plaintiff by stopping payment on its non-refundable earnest money deposit; (c) finding that Plaintiff in good faith, and in a commercially reasonable manner, resold the assets at

auction for a total of \$142,500.00; and (d) awarding Plaintiff a money judgment against Defendant in the amount of \$203,233.33, plus costs and attorney's fees.

2. As to Count 2: (a) finding that Defendant issued a check in the amount of \$73,333.33 that was dishonored; (b) finding that Plaintiff gave Defendant proper notice and demand for payment regarding the dishonored check; (c) finding that Plaintiff gave proper notice to Defendant of penalties it would be liable for under §604.113; and (d) awarding Plaintiff a money judgment against Defendant in the amount of \$146,696.66, plus interest, costs, and attorney's fees.

3. Granting Plaintiff such other and further relief as is just and equitable.

Dated this 25th day of October, 2012.

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VERIFICATION

J. Richard Stermer, in his capacity as Trustee of the Chapter 7 bankruptcy estate of Infinite Spirits, Inc., Plaintiff herein, declares under penalty of perjury that he has read the foregoing Complaint and that the facts set forth therein are true and correct according to the best of his knowledge, information and belief.

/e/ J. Richard Stermer
J. Richard Stermer